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No. 87-460

In the Supreme Court of the United States

OCTOBER TERM, 1987

JUAN LUIS BOSCIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the denial of his motion to dismiss the indictment on grounds of grand jury error is subject to interlocutory review.

1. On October 31, 1985, petitioner and a co-defendant were indicted on three counts of extortion, in violation of 18 U.S.C. 1951. Petitioner moved to dismiss the indictment on grounds of prosecutorial misconduct before the grand jury,[1] asserting that the prosecutor had exposed the grand jury to the co-defendant's "tainted" immunized testimony; that the prosecutor had improperly influenced the grand jury; that a federal agent had lied before the grand jury; that the prosecutor had excluded exculpatory evidence requested by the grand jurors; and that unautho-

[1] Petitioner also moved to dismiss the indictment on double jeopardy grounds. The district court denied that motion. Petitioner's interlocutory appeal from the district court's order, C.A. No. 87-1103, is currently pending in the court of appeals.

rized persons had been present in the grand jury room. That motion was denied by the district court (Pet. App. 52a-55a). Petitioner then filed a notice of appeal from the district court's order.

Before briefing on the merits, the court of appeals ordered petitioner to show cause why the appeal should not be dismissed on jurisdictional grounds. In its show-cause order, the court of appeals stated that "[u]pon review of the record in this case it appears that this court may not have jurisdiction to consider the appeal because the order denying the motion to dismiss is an interlocutory order" (Pet. App. 4a). In response (see *id.* at 11a-38a), petitioner pointed to this Court's decision in *United States* v. *Mechanik,* 475 U.S. 66 (1986), which held that a conviction at trial renders "any error in the grand jury proceeding connected with the charging decision * * * harmless beyond a reasonable doubt" (*id.* at 70 (footnote omitted)). Because *Mechanik* makes it impossible to raise his grand jury claims after conviction, petitioner contended, the district court's dismissal of his motion should be viewed as an appealable collateral order within the meaning of *Cohen* v. *Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949). In a brief order, the court of appeals dismissed petitioner's appeal.

2. As petitioner notes (Pet. 23-25), the courts of appeals have taken differing approaches to the appealability of claims of grand jury error. The Ninth Circuit, in *United States* v. *Benjamin,* 812 F.2d 548 (1987), and *United States* v. *Dederich,* 825 F.2d 1317 (1987), has held that all grand jury claims may be raised on interlocutory appeal. The court reached that conclusion after first concluding that *Mechanik* bars any post-conviction appeal challenging errors committed before the grand jury; in the absence of a right to post-conviction review, the court has held, a defendant is entitled to raise such claims on appeal before trial. In contrast, the First Circuit in this case refused to

permit petitioner to raise a claim of grand jury error on interlocutory review. In a subsequent decision, the First Circuit has held more generally that the denial of a motion to dismiss on grounds of grand jury error may not be reviewed before trial, even if the claim could not be raised after trial because of *Mechanik*. See *United States* v. *LaRouche Campaign*, 829 F.2d 250 (1987). The Tenth Circuit, in *United States* v. *Taylor*, 798 F.2d 1337 (1986), has also refused to entertain an interlocutory appeal from the denial of a motion to dismiss on grounds of grand jury abuse, but for a different reason: in the Tenth Circuit's view, claims of serious grand jury error may be raised after conviction notwithstanding *Mechanik*; accordingly, there is no need to permit such claims to be the subject of pretrial appeals.

Although this issue may ultimately warrant this Court's review, we believe that it would be premature for the Court to consider the question at this time. Because the Tenth Circuit would not permit an interlocutory appeal on the facts of this case, the First Circuit's decision in this case conflicts only with the Ninth Circuit's decisions in *Benjamin* and *Dederich*. The government has filed petitions for rehearing en banc in both of those cases, contending that claims of grand jury error are not appealable either before or after conviction. The Ninth Circuit has called for responses from the defendants to both petitions, which remain pending. If the government ultimately prevails in those cases, the conflict among the circuits will be substantially, if not wholly, resolved.[2] We submit, there-

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[2] To be sure, the Tenth Circuit's approach to the problem differs from the approach adopted by the First Circuit in the *LaRouche Campaign* case, since the Tenth Circuit has based its refusal to permit interlocutory appeals on the ground that certain grand jury issues may be raised after conviction, while the First Circuit would not permit interlocutory appeals in the case of claims of grand jury abuse, even if

fore, that the prospect of a conflict among the circuits on this issue, while real, has not yet ripened to the point that this Court's intervention is called for.

It is worth adding that petitioner's claims of prosecutorial misconduct before the grand jury are frivolous on the merits. Petitioner's principal claim (see Pet. 14-17) is that the prosecutor disregarded a court order in failing to read the entire transcript of the proceedings before the first grand jury to the second grand jury that indicted petitioner in this case. As the district court explained in rejecting this contention, however, "the order of this Court did not and could not * * * require the prosecutor to read to the grand jury the entire transcript of the testimony of each and every witness presented to the first grand jury. The Court's order merely *authorized* the United States Attorney for this district to disclose and transfer to the second grand jury documentary and testimonial evidence presented to the first" (Pet. App. 52a-53a (emphasis in original)). Petitioner also contends that the prosecutor erred in submitting to the grand jury evidence produced by petitioner's co-defendant under a grant of immunity (as well as the fruits of that evidence) (see Pet. 17-20). But as the district court observed, petitioner has "no standing to

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Mechanik forecloses post-conviction review of such claims. Nonetheless, both the First and Tenth Circuits would refuse to permit interlocutory review in this case and in many other cases raising grand jury issues. At least with regard to the issue of appealability, the Tenth Circuit's analysis would foreclose interlocutory appeal on all grand jury claims, with the possible exception of claims that *Mechanik* squarely held to be barred from consideration on post-conviction review. As to those claims, the Tenth Circuit has not ruled whether interlocutory appeals would be permitted, since the *Taylor* case did not involve a claim falling into that category. Any possible conflict between the First and Tenth Circuits, therefore, will arise only if and when the Tenth Circuit allows a grand jury challenge to be raised before trial on the ground that it would be barred from being raised after conviction.

claim under [the co-defendant's] immunity" (Pet. App. 54a). Indeed, any other conclusion would make it impossible ever to use immunized testimony for any purpose.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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